that heavy damages have in fact been awarded in England in cases such as these where a brain injury has caused a change of personality resulting in partial or permanent unemployability of the victim. Even where no physical injuries have been caused (as in the last case cited) damages have been awarded for an anxiety neurosis state causing business loss. In the present case, however, the plaintiff is still employed in the Police Force, although on lighter duties than before, and is receiving his usual salary of about $175 per month. Although he did not suffer such severe injuries as the plaintiffs in the cases cited, except the last one, he nevertheless sustained some injury to his brain or spinal cord which has contributed to his present condition. There is however little evidence of any marked change of personality or actual loss of earnings as in the English cases and I have to determine the extent of his diminished potential as a husband, a father and a bread-winner.

Although he has not yet retired on medical grounds it is clear from Professor Ransome's opinion that the Police have been charitable in keeping him in the Force at all. As there is no reason to believe that his condition will improve in the near future, although it might, I have to ascertain the sum which would be adequate compensation to him for what he has undergone and for such loss of amenities as he may have suffered as well as for any possible loss of earnings he may incur in the future whilst still handicapped as he is. It is difficult to forecast with any accuracy how quickly, if at all, he will attain normalcy and I have proceeded on the basis that he will eventually recover from the hysterical state brought on by this litigation particularly if a reasonably attractive sum is awarded. In all the circumstances I think that a figure of about $12,000 is the right one and I assess the general damages accordingly.

Order accordingly.

Solicitors: *de Souza & de Souza; P. T. Wong & Co.*

WONG SIEW FONG v. WONG SIEW FONG

[O.C.J. (Gill J.) September 14, 1963]
[K.L. — Divorce Suit No. 3 of 1962]

Husband and Wife—Divorce—Cruelty—Persistent nagging by wife—Assault by husband—Cross-petition—Exercise of discretion—Decree nisi on both.

Constant and persistent nagging by a wife without any justification against a husband resulting in a deterioration of his health amounts to cruelty.

Even though one party is more to blame than the other, the court in the exercise of its discretion may pronounce a decree *nisi* on the petition and the cross-petition.

Cases referred to:—

(1) *Russell* v. *Russell* [1897] A.C. 395.
(2) *King* v. *King* [1953] A.C. 124, 129.
(3) *Horton* v. *Horton* [1940] P. 187, 193.
(4) *Atkins* v. *Atkins* [1942] 2 All E.R. 637, 638.
(5) *Usmar* v. *Usmar* [1949] P. 1, 9.
(6) *Blunt* v. *Blunt* [1943] A.C. 517, 531.
(7) *O'Brien* v. *O'Brien* [1950] W.N. 330.
(8) *Anstey* v. *Anstey and Hartford* [1962] 1 All E.R. 741.

DIVORCE PETITION.

K. A. Menon for the petitioner.

S. T. Chung for the respondent.

Cur. Adv. Vult.

Gill J.: This is a petition for divorce by a husband on the ground of his wife's cruelty consisting of constant and persistent nagging. In answer to the petition the wife has denied cruelty as alleged and cross-petitioned for divorce on the ground of her husband's cruelty consisting of acts of physical violence.

The parties were married on 15th March, 1947 at the Chinese Gospel Hall, Davidson Road, Kuala Lumpur, the petitioner being then twenty-five years of age and the respondent twenty-four. After the marriage they lived and cohabited at various places and finally at No. 26, Yap Kwan Seng Road, Kuala Lumpur which was their permanent matrimonial home until the marriage broke down with the wife leaving the house on 27th September, 1961 and taking the children with her. There are now living four children of the marriage, three daughters and a son. The eldest child, a daughter, was born on the 4th December, 1947 and the youngest, a son, on 20th February, 1957.

During the first year of their marriage the parties stayed in the petitioner's mother's house in Birch Road, Kuala Lumpur. According to the husband, the wife was not very happy with this arrangement because she could not get along very well with the members of his family. The wife, on the other hand, says that they moved out of her husband's mother's house because her husband could not get on with his own mother. Nothing very much turns on this evidence, but I mention this only to remark that I regard the petitioner's story in this connection as being more probable and true.

At the time of the marriage the husband was employed as a clerk in the China Insurance Company, Kuala Lumpur. The wife was working as a clerk in the Malayan Railway, but she resigned her job at her husband's request in 1949, just before her second child was born, in order to look after the house. The husband's salary was about $250 a month, but he supplemented his income by selling insurance after office hours. This involved his having to meet friends and clients after office hours so that he normally came home between 6.00 and 6.30 p.m. The husband has stated in evidence that because he came home late his

wife was very suspicious. She thought he was chasing after women or spending time elsewhere. She nagged him, scolded him and asked him why he was late as if she was conducting an inquisition. She did this very often notwithstanding the husband's explanation that during office hours he had to do office work and that he could sell insurance only after office hours so as to supplement his income and provide sufficient money for the family.

The wife has denied all these allegations by the husband but, in view of the subsequent events which led to the break-up of the matrimonial home, I cannot accept the wife's complete denial that she ever nagged, scolded or asked her husband for an explanation for returning home late. That the husband worked hard and made money is borne out by his ability to acquire a piece of land in Yap Kwan Seng Road and build a house thereon within a few years of the marriage and by his promotion to the post of Assistant Manager of China Insurance Company in 1955. I cannot help saying that it was sheer ingratitude on the part of the wife in those circumstances to remonstrate with her husband for coming home late and accusing him without any foundation of associating with other women. It is significant that the wife was made the owner of the matrimonial house in Yap Kwan Seng Road and that she is the owner of it to this day. Although these events before 1956 could not possibly have warranted an action for divorce on the ground of cruelty, I mention them because I consider them relevant in the context of the entire matrimonial relations and because they are in the nature of a prelude to what happened afterwards.

The husband's evidence is that from the time he became Assistant Manager of the Insurance Company his wife became more and more possessive, jealous and suspicious. She did not want him to mix socially with his clients and business associates. In the course of his business he had to invite such clients and business associates to the house occasionally, but the wife disliked them and looked upon them as womanizers and bad company. He decided to take up photography as a hobby so as to be able to take photographs at his children's birthday parties for the family album and approached a friend of his who was a keen photographer to teach him how to take pictures He went out with that friend only twice because his wife openly accused him that his going out to learn photography was merely a cover to chase other women. Not satisfied with this, she approached his younger brother's wife to speak to his friend's wife that her husband was having a bad influence on the petitioner. All this is denied by the wife but I accept what the husband has said to be substantially true. In the end he gave up photography entirely just to avoid his wife's constant suspicion.

The wife next approached a clerk in her husband's office named Liew Foo Fah (P.W. 6) to do her a favour by investigating whether her husband was chasing any woman. Mr. Liew corroborated this part of the husband's evidence by saying that he reported the matter to the husband on the same afternoon as the approach was made to him by the wife. The wife's story is a complete denial of this, her explanation being that Mr. Liew told lies because he had borrowed some money from her and resented being asked to repay.

At about this time the wife told the husband that her sister, Headmistress of Bukit Bintang School, had seen him going out with one of her pupils. He explained to his wife that this was pure nonsense, but she remained unconvinced by his protestations. The husband telephoned the wife's sister and challenged her to identify the girl and that he would go with her to the girl's house and allow himself to be identified. The wife's sister brushed aside the whole story by saying that the husband must have heard about it wrongly. The husband communicated this answer to his wife and subsequently spoke to her father about it.

The husband next gave evidence to say that his wife opened his letters coming to the house and that she often examined his diary which he always kept in his wallet. She was also in the habit of examining his underwear when he threw it amongst his soiled clothes before going into the bathroom for his bath in the evenings. He went on to say that his eldest sister, Mrs. Chan Chor Hong, told him one day that his wife had informed her that she examined his underwear for tell-tale marks or stains. He did not confront his wife with this, but this sort of thing did not please him. Her wild accusations caused him anxiety and insulted his dignity and they led to a lot of heated words and arguments fairly regularly.

In the latter part of 1958 the wife began to have pains in the lower abdominal region, for which she consulted Dr. Young. As a result of her visits to Dr. Young, she accused the husband of having infected her with veneral disease and told him that Dr. Young wanted to test his blood and urine. The husband was annoyed and embarrassed at this and told her that he would make an appointment with Dr. Young at his own convenience. A few days later one of the children fell ill and at the request of his wife the husband visited Dr. Young's dispensary. Upon seeing him at the dispensary Dr. Young spoke to the husband and said that as the wife was very worried about her pains it would be better for him to have his blood and urine tested as some sort of precautionary measure. The husband readily submitted to this examination. He says

that he knew for certain that his wife had planned this visit for him to Dr. Young without telling him about it.

Subsequently he challenged her about the appointment with Dr. Young and said that she had tricked him into seeing Dr. Young. He also told her that she had stripped him of his self-respect and embarrased him very much in the presence of Dr. Young. They both raised their voices in anger as a result of which a quarrel developed. The wife went into the bedroom and slammed the door. The husband pushed open the door and slapped her across the face about four times because he was in such temper provoked by her. When the husband came home from the office that evening he found that his wife and children had packed their belongings and left the house. The husband's brother brought them back a week later.

In 1960 the wife had an operation for fibroids and it became necessary for her womb to be removed at the same operation. Again she told her husband that he was the cause of her pains, implying that he was suffering from some sort of venereal disease. She also asked for his urine to be tested again. This time the husband had his urine tested by his own doctor brother. The wife continued having frequent urination and pain even after the operation, for which she continued to receive treatment from Dr. Young and other doctors in Dr. Young's clinic and she remained convinced that the pains were due to venereal disease, notwithstanding the fact that the results of both tests of her husband's blood and urine were negative.

I now come to the incident of 25th September, 1961 which led to the final break-up of the marriage. The husband came home that evening at about 6.30 p.m. He went into his bedroom to undress, preparatory to having his bath. As usual he put the soiled underwear on the spare bed in the children's bedroom and then went into the living room. He then saw that his wife was quick in getting into the children's room and he saw her examining his underpants. He went in from the living room and spoke to her from behind. He questioned her what she was looking for and told her that as a wife she had no confidence in her husband and that she had been examining his underpants for years. He also told her how her outrageous accusations had caused him embarrassment. Both of them raised their voices and a big quarrel developed. He caught hold of her collar by the right hand and pointed to the soiled underwear with his left hand challenging her to prove any evidence in his underwear. He then shook her a few times. He has denied that he mentioned knives to his wife or threatened to kill her.

From the evening of 25th September, 1961 the husband did not speak to his wife. He says that he did not get any sleep on the night of 25th September and did not take any food. On the following day he had a cup of tea and a slice of bread. At about 11 a.m. on that day he felt very sick and giddy and had a short spell of blackout. As a result he went to see Dr. Kandiah who gave him an injection and some pills to help him to sleep. The wife left the house with the children on 27th September, 1961.

Under cross-examination the husband said that he did not consider himself entirely blameless as no man is perfect, but he disagreed that the break-up of the marriage was partly due to his fault. To a small extent he was to blame for the frequent quarrels because he easily got excited, being slightly short-tempered, but he could not avoid the quarrels because of his wife's persistent nagging. He says that he went out late at night only on official occasions, and this would appear to have been so at any rate since 1960.

The husband has called a number of witnesses to support his petition. Dr. Wong Siew Thim (P.W. 2), the younger brother of the petitioner, testified that when he was doing his housemanship in the General Hospital, Kuala Lumpur in the year 1957/58 he came to know that the relationship between the petitioner and the respondent was rather strained because of frequent quarrels which were brought about by the wife's unfounded allegations of the petitioner's association with women. The witness went on to testify that the wife blamed her husband for her womb trouble. The respondent visited Mr. Fraser, the Surgeon of the General Hospital, Kuala Lumpur, for a series of investigations and tests. On some occasions this witness sent the respondent's urine for test to the Institute of Medical Research, and the results were all negative for venereal disease. On one occasion the respondent spoke to this witness about some lymph glands which her son had at the back of the head and asked him whether the cause of those enlarged glands was venereal disease infection being passed on from mother to the child. On another occasion the respondent spoke to the witness about her third daughter complaining of frequency in urination. The witness was asked whether this could be due to venereal disease infection passed to the daughter through toilet articles. Finally, this witness gave evidence about a telephone call which he had from the second daughter of the respondent about the quarrel which the parties had on the night of 25th September, 1961. He merely heard the version of the parties as to the cause of the quarrel because he arrived after the quarrel.

Mrs. Wong Siew Thim (P.W.4) said that she was on fairly friendly terms with the respondent who confided in her that the petitioner always came home late, did not care for the children and was going after other women. The

respondent also spoke to this witness about the petitioner's association with a Mr. Chan who was teaching him photography and told her that the petitioner and Mr. Chan were going after women. At respondent's request the witness spoke to Mrs. Chan requesting her to tell her husband not to go out with the petitioner.

Wong Yin Cheng (P.W.5), the eldest sister of the petitioner, said that she was on fairly friendly terms with the respondent who frequently discussed matters with her over the telephone and complained that her husband was no good, that he left the house early in the morning and returned late from the office and that she was certain that her husband was in the company of women. According to this witness the respondent examined the petitioner's underpants and if she found stains on the underwear she would come to the conclusion that her husband had been with other women.

Dr. Kandiah (P.W.3) testified that the petitioner consulted him fairly regularly from November 1959 and that he noticed a change in the petitioner's condition from March 1961. The petitioner appeared to be depressed and irritable and generally run down in health. In September 1961 the petitioner informed him that he had a quarrel with his wife and that she had left him. Before that the petitioner had told Dr. Kandiah that he was not happy at home because his wife was setting up his children against him and that she was suspicious about his extra marital behaviour because he stayed late in the office. The witness said that from the first time he saw the petitioner up to 29th November, 1961 he noticed that the petitioner's health was deteriorating and that this deterioration in his health was consistent with his domestic troubles.

The wife's story is that the early part of her married life with the petitioner up to the time he became an Assistant Manager of the China Insurance Company was a happy one. Her married life started to change in 1956 when her husband started to go out late at night, at first on two or three evenings in the week and later up to five or six days in a week. This going out of the petitioner at night and coming home late went on until 1960. She said that she picked up the husband's underpants only to wash the stains of ointment which he was using for his piles. In July 1958 she noticed some fresh stains on the underpants and asked the petitioner where he had been, but the petitioner did not reply to her and scolded her in bad language. Because she was afraid that the husband would come back and beat her she spent the week-end with her children in her mother's house. As she was about to leave the house to go to her mother's house, the petitioner's doctor brother came to her house for his dinner. He asked her what had happened. She told him about the incident, whereupon the doctor said, "It is only natural that men should go for prostituting and a wife should overlook it."

Soon after the July incident she had an infection of the urinary tract for which she consulted Dr. Young. Her husband accompanied her to see Dr. Young, who took their blood for test and told them to see him after a week to get the results of the blood test. After their blood was taken for testing she noticed that her husband was very worried and then on one morning he told her that he had been to high-class prostitutes three times. The results of the blood tests proved negative and this made the husband very happy. In October, 1958 she wanted her husband to make an appointment with Dr. Young, but he said he would go when he liked. He then raised his voice and scolded her and she locked herself in the bathroom because she was afraid. He broke open the bathroom door and assulted her.

The petitioner assaulted her again on 25th September, 1961 when he caught hold of her by the neck and dragged her to the place where soiled clothes were kept in her daughter's bedroom and accused her of having examined his underpants on the previous Friday night. Apart from assaulting her he threatened her with two knives saying that he had purposely bought them to kill her. He then compelled her under threats to kill her to sign a blank cheque and five blank share transfer forms. He also snatched her ring from her finger and told her to hand over her box of jewellery. On the following morning her husband was in very bad temper and she went to see Dr. Young about her injuries. On 27th September the husband was still in very bad temper and because she was afraid of a repetition of the assult she packed up a few belongings and left the house. Later she fetched her children from school.

She denied that she made any false accusation against her husband of his being seen with a girl from Bukit Bintang School. She very seldom spoke to Dr. Wong Siew Thim after the incident of July 1953 when he had said that it was only natural for men to go to prostitutes.

She admitted that she told Mrs. Wong Siew Thim about her troubles when the latter came down to Kuala Lumpur from Mentakab in February 1960 for her confinement. This was after Mrs. Wong had confided in her with tears about her domestic troubles. After this they became very friendly but she noticed a change in Mrs. Wong's attitude towards her after 27th September, 1961. She admitted that she said to her in Cantonese that she would not feel sorry if her husband died, but that she said it in anger without actually meaning it.

The respondent denied that she ever asked Liew Foo Fah to spy on her husband. Whenever her husband was not free, Liew Foo Fah

would take her and the children to the doctor and then send them home. On one of such visits he borrowed ten dollars from her and then casually told her that her husband had a girl friend. She made a telephone call to Liew Foo Fah from China Arts House a few days after this and asked him to come and see her, her intention being to find out more from him about her husband's girl friend. Liew Foo Fah gave her no information. This was not very long before her husband assaulted her in October, 1958 and charged her with asking Liew Foo Fah about this girl.

The respondent was subjected to lengthy cross-examination. I must say that she did not impress me as a very truthful witness when she answered the questions put to her under cross-examination. She said that she happened to pick up her husband's underpants in July 1958 and noticed fresh seminal stains on them. Her suspicions against her husband about his having other women arose after this incident, but she denied that she went on examining his underpants. The petitioner's doctor brother's remarks also aroused her suspicions. As regards her visits to Dr. Young, she said she did not suggest to Dr. Young that her husband's blood should be tested. Furthermore she did not say to Dr. Young that her husband might have been infected. The blood tests, according to her, were entirely on Dr. Young's own suggestion. She admitted that prior to October 1958 her husband had never assaulted her or hit her and that on that morning he accused her of asking Liew Foo Fah to pry into his private affairs. She denied that she ever insulted her husband by saying that he was responsible for her pains and her urinary tract infection. She also did not accuse him of being responsible for her fibroids in her womb. As regards the incident of 25th September she said that the petitioner accused her of something which she was alleged to have done four days earlier.

The respondent too called a number of witnesses. Mah Tak Yan (D.W.2), her sister, gave evidence to say that she never told the respondent at any time from 1958 to 1960 that she had seen the petitioner in the company of a girl from her school and that the petitioner never telephoned her about it. Leong Yeut Kew (D.W.3) gave evidence of the assault on respondent in 1958. Wong Sim Yoong (D.W.4), the eldest daughter of the petitioner and the respondent, gave evidence of the incident on 25th September, 1961. I cannot rely very much on her evidence because it is quite clear to me that the mother has succeeded in turning her children against the father. In any event nothing very much turns on her evidence in so far as the petition by the husband is concerned.

Dr. Young's evidence in so far as the husband's petition is concerned does not help the respondent very much. His evidence is that the respondent told him that she feared that she had contracted venereal disease from her husband. She informed him that she developed this suspicion because she suspected that her husband had been having intercourse with other women. She actually used the word "prostitute" to the doctor. She also told him about discovering seminal stains on her husband's clothings on one occasion. He finally said that the blood and urine tests were made at respondent's request and that the results of these tests were negative for any type of venereal disease. The doctor then produced a letter signed by Dr. Seal (P.6). The letter speaks for itself and it is clear from it that she suspected her husband of infidelity.

On all this evidence before me the question which I have to decide is whether the parties have proved their respective cases. I have dealt with the evidence at great length, but ultimately this case falls to be decided mainly on the evidence of the parties themselves.

The first question I have to decide is whether the husband has established legal cruelty. Cruelty to be a ground for dissolution of marriage has been defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, so as to give rise to an apprehension of such a danger (see *Russell* v. *Russell* [1]). Other judicial pronouncements in England have stated that in determining what constitutes cruelty, regard must be had to the circumstances of each particular case keeping always in view the physical and mental condition of the parties, and their character and social status. Lord Normand said in the House of Lords in *King* v. *King* [2] that the general rule in all questions of cruelty is that the whole matrimonial relations must be considered and that this rule is of special value when the cruelty consists not of violent acts, but of injuries, reproaches, complaints, or taunts. His Lordship further stated that wilful accusations may be made which are not true and for which there are no probable grounds, and yet they may not amount to cruelty. It has also been said, in my very humble opinion quite rightly, that what may be cruelty to one person may not necessarily be cruelty to another.

It seems clear from the authorities that nagging may amount to cruelty in the same way as acts of physical violence. In *Horton* v. *Horton* [3] Bucknill J. said:

> "Mere conduct which causes injury to health is not enough. A man takes the woman for his wife for better, for worse. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think he establishes cruelty merely because he finds life with her is impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing him injury to health."

Henn Collin J. in *Atkins* v. *Atkins* [4] said:

"One knows that dropping water wears the stone. Constant nagging will become completely intolerable, and though in the course of married life you may be able to point to no single instance which could possibly be described as, in common parlance, 'a row', yet nagging may be of such a kind, and so constant, that it endangers the health of the spouse on whom it is inflicted."

The above passages from the judgments of Bucknill J. and Henn Collins J. were cited with approval by Willmer J. in *Usmar* v. *Usmar*,[5] after which His Lordship went on to state his own views as follows:

"It is, however, established that mere nagging, abusiveness and jealousy can in certain cases amount in themselves to such an interference in the life of the other spouse as to justify this court in coming to the conclusion that they constitute cruelty."

I have given the whole of the evidence in this case very careful consideration and I am satisfied that the wife made her husband's life miserable by constantly and persistently nagging at him by accusing him of associating with other women and repeating such accusations to all and sundry to the annoyance, embarrassment and humiliation of her husband. These accusations were made without any justification or foundation and purely because of her insane jealousy and possessiveness. On his own admission the petitioner is very reserved by nature and inclined to be short-tempered. This is something of which the wife should have been fully aware. For her to have gone on taunting him with interest in other women on mere suspicion was perhaps the worst form of cruelty that a wife can inflict upon her husband.

The only question which has exercised my mind is whether the husband has succeeded in showing whether the wilful and unjustifiable conduct on the part of the wife caused danger to his health. The petitioner's visits to Dr. Kandiah were numerous, but a very large number of these visits were for common ailments. However Dr. Kandiah has stated that he did notice a deterioration in the health of the petitioner and that this deterioration in his health was consistent with his domestic unhappiness. Taking that into consideration I have come to the conclusion that the petitioner has established a case of cruelty.

I have also come to the conclusion that the respondent has made out a case of cruelty against the petitioner. This cruelty consists of two assaults upon the respondent, the first one in October 1958 and the second on 25th September, 1961. I do not think provocation by the wife can be a complete defence in this case as the mode of resentment did not bear a reasonable relationship to the provocation offered on each of the two occasions. Both parties have given evidence as to the details of the two assaults. The husband has perhaps minimized the nature of the assaults and the wife exaggerated them, but there is no doubt that these two assaults did take place. On the first occasion the wife had locked herself up in the bathroom. The husband proceeded to pursue her into the bathroom and to assault her. The wife went to Dr. Young for treatment and Dr. Young has given evidence of the injuries which he found on her. To my mind, this act of cruelty revived with the second assault upon the respondent by the petitioner. Here again there is no doubt that the assault did take place although I do not believe the wife's story when she says that her husband threatened her with knives. That she was terrified by this assault is indicated by the fact that she left the house on 27th September, 1961 because the husband continued to be in bad temper and she feared further assaults.

To my mind this case falls within the following words of Lord Simon in *Blunt* v. *Blunt* [6]:

"Speaking, however more generally, it appears to me that cases may not infrequently arise in which each party, while proving the case for his or her petition, has been guilty of such conduct as by the terms of the statute entitles the court to dismiss the petition, where injustice may be done if discretion is exercised in favour of one of the parties only. There is no reason in principle why, where both sides are in mercy, if the judge decides to exercise his discretion, he should not exercise it in favour of both parties and pronounce the decree without drawing a distinction between them. If, for example, the blame for the break-down of the marriage must be equally shared and the circumstances are such as do not justify a judicial preference for one party as compared with the other, serious injustice may be done if a decree of divorce is pronounced in favour of one party while the petition of the other party is dismissed. Under s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, the court in fixing, on any decree for divorce, what payment is to be secured by the husband to the wife is to have regard 'to the conduct of the parties,' and the wife may be unduly favoured, or unduly handicapped, if the judge in a case where there is little to choose between the parties, only pronounces a decree in favour of one spouse. There is, of course, the alternative of refusing the exercise of discretion to either side, but where the judge decides that it is his duty to exercise his discretion and thus bring the marriage to an end, the method of doing so just referred to should, in proper instances, not be overlooked."

In *O'Brien* v. *O'Brien* [7] Denning L.J. referred to the above passage of Lord Simon's and went on to say that this form of decree was appropriate even though one party was more or much more to blame than the other, and that all that the Judge says about the conduct of the parties should be available to any court which has to deal with ancillary matters. The court in that case decided that the right order was for the court, in the exercise of its discretion, to pronounce a decree nisi on the ground of adultery and on the cross-petition on the ground of desertion. I am of the opinion that in this case the wife is more to blame for the break-up of the marriage than the husband.

The primary consideration in this case, in the words of Lord Simon in the case of *Blunt* v. *Blunt*, is to maintain a true balance between respect for the binding sanctity of marriage and

the social considerations which make it contrary to public policy to insist on the maintenance of the union which has utterly broken down. I am satisfied that in this case the marriage has completely and utterly broken down. It is open to this court to refuse to exercise its discretion in favour of either party whereupon both petitions will stand dismissed and the marriage remain unresolved, but I do not propose to adopt that course because I am satisfied that there is no prospect whatsoever of reconciliation between the spouses. With the case of *Anstey* v. *Anstey and Hartford* [8] very much in mind, I exercise my discretion on the case as a whole and pronounce a decree nisi to be made absolute in three months on the petition on the ground of cruelty and also on the cross-petition on the same ground. Each party to bear his or her own costs. Parties to have liberty to apply.

Decrees nisi granted.

Solicitors: *Braddell & Ramani; Chung & Huang.*

SIAH v. TENGKU NONG

[F.C. (Barakbah C.J., Azmi & Suffian JJ.) October 8, 1963]

[Kuala Trengganu — Federal Court Civil Appeal No. 2 of 1963]

Contract—Agreement to transfer future interest in land—Admission of oral evidence to establish transaction was loan and charge—Whether transaction a sale—Whether agreement enforceable—Defence of fraud—Defence not heard—Whether specific performance should be ordered.

In 1957 Tengku Nong now deceased received a sum of $1,000 from the plaintiff and by an agreement in writing she agreed to transfer to the plaintiff an acre of land of which she was not the proprietor but to which she was entitled in conjunction with others on the distribution of the estate of her late father.

On a claim by the plaintiff for specific performance of the agreement her administrator admitted receipt of the money but contended that it was a loan, that the land had only been charged to the plaintiff and that the agreement was fraudulently executed in that it was not read over and explained to the deceased.

Held: (1) oral evidence was not admissible to show that the transaction was a loan and charge;

(2) as fraud had been pleaded and the defence had not been heard, no specific performance should be ordered.

FEDERAL COURT.

Hashim bin Abdullah for the appellant.

Maidin bin Mohamed Ibrahim for the respondent.

Suffian J. (delivering oral judgment): Tengku Nong now deceased was the daughter of the late His Highness Sultan Ahmad.

After her father's death, she received $1,000 from the plaintiff and on 11th February 1957 signed the agreement exhibit P.1, a translation of which is in the following terms:—

12th Feb. Stamp. .50 cts.
K. 86/57
(Chop Stamp Office)
Kuala Trengganu.
Sd. xxx

ACKNOWLEDGMENT OF RECEIPT OF MONEY

Executed in Town of Kuala Trengganu on 11th day of February, 1957.

I, Tengku Nong binti Al-marhom Sultan Ahmad, residing at Kampong Gong Kapas, Kuala Trengganu, during sound mind and good health and on my own accord on this day and date of executing this document, acknowledge receipt of one thousand dollars only ($1,000.00) from Siah binti Abdullah of Kampong Dalam Kota Istana Maziah, Kuala Trengganu.

2. I (Tengku Nong binti Al-marhom Sultan Ahmad), agree that as soon as the estate of my father (Al-marhom Sultan Ahmad) is distributed in the Supreme Court, Kuala Trengganu, in which I am entitled, I will execute in Land Office a transfer of (1) acre of land known as Grant No. 1986, Mukim Bukit Besar, Kuala Trengganu, and I cannot refuse or make default of same.

3. If I fail to transfer 1 acre of the said land to Siah binti Abdullah, she will be entitled to sue me in accordance with the law.

In witness whereof both parties put their hands hereunder in the presence of witnesses.

xxxx
RTP. Tengku Nong binti Al-marhom Sultan Ahmad.

yyyy
RTP. of Siah binti Abdullah
i.c. Tr. No. ....

Witnessed by: Sd: xx illegible
Sd: xyxy Tengku Wook Chik.
Petition Writer
no. 22/57 Ja'afar bin Ali,
Kuala Trengganu.

Sd: Ja'afar bin Ali.

The plaintiff asked for specific performance of this agreement. The defendant, Che Osman bin Ali, the administrator of Tengku Nong's estate, in his written defence admitted receipt of the $1,000 but contended that it was a loan, that the land now worth $12,000 to $13,000 per acre had only been charged to the plaintiff and that exhibit P.1 was fraudulently executed because it was not read over and explained to Tengku Nong.

The plaintiff gave evidence and in support called two witnesses. After she had closed her case, according to the records, "Che Maidin (for the defendant) admits that (the) $1,000 was given as a loan. Defendant knows nothing about P.1", whereupon the learned Judge without hearing any further evidence gave judgment for the plaintiff for $1,000, each party to pay its own costs.

The learned Judge dismissed the plaintiff's claim for specific performance because

(1) The agreement related to an unspecified portion of the land at present registered in the name of the various beneficiaries of Sultan Ahmad, including Tengku Nong whose registered share was admitted as 12,840,